

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeen G. Kelly.

City of Tacoma, Washington

Project No. 460-032

ORDER DENYING REHEARING

(Issued March 4, 2005)

1. On February 14, 2005, we issued an order disposing of all pending rehearing requests pertaining to relicensing the 131-megawatt Cushman Hydroelectric Project.<sup>1</sup> We also denied two motions, filed by the Skokomish Indian Tribe, for license articles on water rights and for clarification of the Commission staff's approval of the licensee's procurement specifications for a minimum flow valve for the project. On February 16, 2004, the Tribe filed a request for rehearing. For the reasons discussed below, we deny rehearing. This order is in the public interest because it resolves two remaining issues in the relicensing proceeding.

**Background**

2. A procedural summary of the proceeding appears in our order of February 14, 2005. On September 30, 2004, the Tribe filed a motion requesting that we amend the new license for the Cushman Project to include two new license articles relating to state water rights held by the project's licensee, City of Tacoma, Washington (Tacoma). Also on September 30, 2004, the Tribe and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) filed a motion for clarification of certain aspects of the Commission staff's approval of Tacoma's procurement specifications for the project's minimum flow valve. In our February 14 order, we denied both motions. The Tribe now seeks rehearing of the denial.

**A. Motion for License Articles on Water Rights**

3. In our February 14 order, we denied the Tribe's motion for license articles on water rights because the facts regarding Tacoma's water rights are in dispute, Tacoma has applied for additional water rights, the Commission lacks the authority to adjudicate

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<sup>1</sup> *City of Tacoma, Washington*, 110 FERC ¶ 61,140 (2005).

water rights under section 27 of the FPA, and Standard License Article 5 already addresses this matter adequately.

4. On rehearing, the Tribe argues that Tacoma has never applied for the necessary additional storage or diversion rights, and that Standard License Article 5 does not sufficiently address the problem because it grants Tacoma an additional five years to obtain its water rights. The Tribe also argues that, because one of the requested license articles would simply require Tacoma's compliance with its existing state water rights "to the satisfaction of the Washington Department of Ecology [Ecology] or a court of competent jurisdiction," the article will not require the Commission to adjudicate water rights. The Tribe adds that it crafted the language of this article to parallel similar language that the Commission has included in other license articles.

5. As noted in our February 14 order, we first addressed this issue in 1995, stating that section 27 of the FPA reserves to the states the authority to enforce alleged violations of state water rights.<sup>2</sup> There is no need to include a license article memorializing what is already reflected in section 27 of the FPA, and Ecology has the discretion to take whatever enforcement action may be appropriate, regardless of whether the project license includes an article on water rights.

6. Section 3(11) of the FPA defines "project" to include necessary water rights. The FPA does not require that a license applicant own all lands and associated rights needed for construction, operation, and maintenance of its project before a license may be issued. If necessary, a licensee may use the federal power of eminent domain to acquire the property it needs, subject to certain limitations, pursuant to section 21 of the FPA.<sup>3</sup> It is for this reason that Standard License Article 5 allows a licensee to obtain the necessary property rights within 5 years from the date of issuance of the license. This is a standard article that applies to all Commission licenses, and we see no reason to modify it in this case.

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<sup>2</sup> 110 FERC ¶ 61,140 at P 57 and n.67 (*citing City of Tacoma, Washington*, 71 FERC ¶ 61,381 at 62,489 (1995)).

<sup>3</sup> *Id.*

7. The cases that the Tribe cites in support of its proposed license articles are not similar.<sup>4</sup> None of them concern a project subject to the initial five-year period in which the licensee must obtain the necessary rights to construct, maintain, and operate the project under Standard License Article 5. In addition, they do not make any findings about the licensees' compliance with state water rights laws, but simply reserve the Commission's authority, after notice and an opportunity for a hearing, to make any changes to the license that may be necessitated by a final water rights determination by a state.

8. In contrast, the conditions that the Tribe requested would go further, requiring (1) that Tacoma comply with its "existing state water rights" to the "satisfaction" of Ecology or a court, including if necessary restricting Tacoma's water usage "to match its authorized amount;" and (2) reserving the Commission's authority to "unilaterally" modify the license in response to "action" taken on Tacoma's water rights by Ecology or a court. As noted, the facts concerning Tacoma's water rights are in dispute, and Ecology has taken no action to date with respect to either enforcement of Tacoma's existing water rights or processing Tacoma's application for additional water rights. In these circumstances, the requested license articles are ambiguous, and interested persons might seek to use them as a means of requiring the Commission, rather than Ecology or a court, to enforce Tacoma's compliance. If, in the future, we are presented with a final water rights determination by the state or a court of competent jurisdiction, we can initiate a proceeding to consider what action may be appropriate. We therefore deny rehearing.

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<sup>4</sup> All three cases which the Tribe cites involved amendments to existing licenses. In two cases, the Commission deferred to state authorities on the issue of water rights, and included a reservation of authority to make any necessary adjustments in light of any final action by the state. See *Pacific Gas & Electric Co.*, 106 FERC ¶ 61,065 at 61,225 (2004); *Public Utility District No. 1 of Chelan County, Washington*, 96 FERC ¶ 61,300 at 62,136 (2001). In the third case, the amendment involved a request for authorization of a non-project use of project lands and waters (in response to a municipality's request to withdraw water for municipal use and drinking), and the Commission conditioned the approval on the filing of a state-issued permit for the withdrawal. See *Georgia Power Co.*, 99 FERC ¶ 61,333 at 62,423 (2002). The latter case discusses Standard License Article 13, which requires that applicants requesting permission to use a project's water resources for municipal or other purposes must show that they possess the necessary water rights pursuant to applicable state law. (Although the case refers to Article 14, this is an error, because the provisions discussed therein appear in Article 13, not Article 14.)

**B. Motion for Clarification of Procurement Specifications**

9. In our February 14 order, we denied the Tribe's motion for clarification that Tacoma's proposed valve specifications could accommodate both the higher flows required by the license and the restorative flows sought by the Tribe and others if, after appeal and remand, the license ultimately contained such a condition. We also denied the Tribe's motion for clarification that, if the valve could not accommodate the higher flows, the Commission would withdraw its acceptance and require Tacoma to submit revised valve specifications to accommodate these flows. On rehearing, the Tribe maintains that our decision does not clarify either point.

10. We believe our decision was clear. First, we denied the Tribe's request to reconsider our rejection of a smaller 24-inch valve on the ground that it would not accommodate both the 2,500 cubic-feet-per-second (cfs) flushing flows required by Article 404 of the license and the 240 cfs minimum flow. Instead, we continued to require the 78-inch discharge regulating valve, because it would accommodate both the 2,500 cfs flushing flows and the 240 cfs minimum flows. This necessarily means that the staff-approved specifications for the minimum flow valve can accommodate the 2500 cfs flushing flows.

11. We also noted that, in our 1998 relicensing decision, we denied the Tribe's and NOAA Fisheries' request for a license condition requiring restorative flows, which would have involved restoring up to 95 per cent of the average natural flow of the North Fork Skokomish River, and explained that these parties could not seek to renew their request by filing a motion for clarification. We also denied the motion for clarification. This necessarily means that the project license does not include the requested requirement for restorative flows, and we denied the request to include such a requirement in response to the motion. To the extent that further clarification might be needed, we reiterate that the staff-approved specifications for the minimum flow valve would not accommodate the previously-rejected restorative flows.

The Commission orders:

The request for rehearing filed in this proceeding on February 16, 2005, by the Skokomish Indian Tribe is denied.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.